IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

THURSDAY, THE 20TH SEPTEMBER 2007 / 29TH BHADRA 1929

RFA.No. 378 of 2006()

OS.465/2003 of I ADDL.SUB COURT,ERNAKULAM
.....

: APPELLANT/PLAINTIFF

PETER CHERIAN VELIYATHUMALIL, AGED 52
YEARS, S/O.N.P.CHERIAN, 28/3591, CHILAVANNUR ROAD,
KADAVANTHRA, KOCHI-20, PRESENTLY WORKING AT DOHA,
QATAR,REP.BY POWER OF ATTORNEY HOLDER,JOSE NIDIRY,
AGED 53 YEARS, S/O.LATE JOHN NIDIRI,RESIDING AT
H.NO.158,JAWAHAR NAGAR, KADAVANTHRA, KOCHI-20.

BY ADV. SRI.SANTHEEP ANKARATH

RESPONDENTS:
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1. M.K.ABRAHAM, S/O.M.G.KOSHY,
MANIYANODIL HOUSE, VALLAMKULAM, ERAVIPEROOR
VILLAGE, THIRUVALLA TALUK, MANAGING PARTNER,
A.B.M.PROPERTIES, RESIDING AT 10 B1, ABM TOWERS,
KADAVANTHRA, KOCHI-20.

2. MOHAN ABRAHAM, S/O.P.K.ABRAHAM,
PUTHENPURACKAL HOUSE, MUNDAKKAYAM VILLAGE,
KANJIRAPPALLY TALUK.

3. BABU THOMAS, S/O.P.V.THOMAS,
PADIKAVEETTIL, VALLAMKULAM, ERAVIPERUR VILLAGE,
THIRUVALLA TALUK.
NOW RESIDING AT H.B.77, PANAMBILLY NAGAR,
ERNAKULAM.

4. A.B.M.BUILDERS PVT.LTD.,
ABM TOWERS, P.O.BOX.NO. 2040,
COCHIN-20.

BY ADV. SMT.T.D.RAJALAKSHMI
SRI.E.R.VENKATESWARAN
SRI.M.A.ZOHARA

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 7/8/2007, ALONG WITH RFA NO. 452 OF 2005 THE COURT ON 20/9/2007
PASSED THE FOLLOWING:

Kurian Joseph & T.R. Ramachandran Nair, JJ.

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R.F.A.NOs.452/2005 & 378/2006

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Dated this the 20th day of September, 2007.

JUDGMENT

T.R. Ramachandran Nair, J.

The above two appeals arise from the judgment and decree in O.S. No.465/2003 on the file of the First Additional Sub Judge's Court, Ernakulam. Defendants 1 and 2 are the appellants in R.F.A. No.452/2005. The plaintiff is the appellant in R.F.A. No.378/2006.

2. The suit was one filed by the plaintiff seeking for a decree of specific performance and alternatively, for return of advance money with interest and to realise amounts towards damages suffered by the plaintiff. The court below, as per the judgment and decree partly decreed the suit for payment of the return of advance money with interest at 18% from 17.7.1996 till the date of plaint and thereafter at the rate of 6% till realisation. Aggrieved by the decree providing payment of interest on the said amount, defendants 1 and 4 have filed R.F.A. No.452/2005. In R.F.A. No.378/2006, the plaintiff has come up in appeal. The challenge is against the refusal of the court below to grant interest at 18% on the advance money from the date of suit and also he has claimed interest at 18% on all the

instalments paid on the said payments as and when they were made till the date from which the court decreed the interest. There is a further claim in respect of an amount of Rs.47,500/-.

3. The short facts relating to the subject matter in controversy are the following:

4. The plaint schedule property was allotted to the third defendant by the Greater Cochin Development Authority for the purpose of developing the plot by constructing a multi-storied building. Defendants 1, 2 and 3 entered into a partnership to implement the above project. The 4th defendant is a partnership firm with which the plaintiff entered into an agreement dated 20.7.1995 agreeing to sell 1/65th share in the undivided 51.152 cents of land in survey Nos.391 and 392 of Elamkulam Village together with the right to construct an apartment on the first floor of the multi-storied building named A.B.M. Towers and the right to construct a covered car parking for a total consideration of Rs.1,90,000/- to the plaintiff. The agreement was to entrust the construction of the building to the 4th defendant company and the amounts were payable in instalments to them in accordance with the payment schedule. The plaintiff was to get the flat constructed with right to use the proportionate share in the common areas and with common facilities and the covered car park. The said agreement is Ext.A1. By another agreement dated 20.7.1995 (Ext.A2) executed between the plaintiff and the 4th defendant, the 4th defendant agreed to construct an apartment

having an extent of 1404 sq. ft. on the first floor of the building for a total cost of Rs.14,04,000/- which includes the price of the 1/65th share in the undivided plaint schedule property and Rs.75,000/- towards cost of parking space for parking one car. It was also agreed that the 4th defendant shall make every endeavour to complete the construction of the apartment before 30th August, 1997 and that possession will be handed over to the plaintiff within 90 days of such completion. The said agreement further stipulated that plaintiff has to make payment either according to the payment schedule incorporated in the agreement or as per the revised payment schedule as agreed to subsequently basing on the stages of construction. In case of default on the part of the plaintiff, the 4th defendant was entitled to cancel the agreement and return the amount received after deducting 10% from the same and in case of default on the part of the 4th defendant, the plaintiff was entitled to realise the amounts paid from the 4th defendant with interest at 18% per annum from the respective payment dates.

5. The case of the plaintiff is that he had paid an amount of Rs.4,01,000/- as advance on the agreement. He had availed a loan from the Housing Development Finance Corporation for payment to the defendants at different stages of construction as agreed and there was a liability to pay

interest to them at 15.5% per annum. In paragraph 4 of the plaint it was specifically pleaded that the plaintiff had paid amounts of Rs.3 lakhs, Rs.1.5 lakhs, Rs.1.5 lakhs and Rs.1.5 lakhs on 12.1.1996, 17.4.1996, 4.7.1996 and 18.9.1996 respectively. As on 18.9.1996, the plaintiff had made payment to the tune of Rs.11,51,000/- towards the total consideration of Rs.14,79,000/- including the price of the parking space. It was also alleged that he had made a further payment of Rs.47,500/- towards flooring and another amount of Rs.32,649/- towards laying of marble.

6. At this stage, disputes arose and on 19.11.1999 the plaintiff was served with a notice from the 4th defendant informing that the defendants have availed loan from the Housing Urban Development Corporation to the tune of Rs.One Crore. The plaintiff was directed to pay an amount of Rs.3 lakhs being the proportionate share of the loan amount against his apartment and to obtain individual apartment clearance. This was disputed by the plaintiff and discussions and deliberations followed. The matter was under correspondence between the parties and finally, pursuant to mediation between the parties, on 26.7.2001 an agreement was arrived at. As per the agreement, the 4th defendant handed over possession of flat 2A1 on the second floor and the car parking lot No.17 to the plaintiff. It was agreed that the plaintiff should give irrevocable bank guarantee of Rs.3,13,149/- together with interest at bank over draft rate till date of payment to the

defendants which shall be payable to them on giving clear title deeds. Accordingly, the plaintiff was put into possession on 27.7.2001 and he made arrangements with his bank to have the bank guarantee given on the same day. This was ready on 6.9.2001. Later on, by a lawyer notice dated 18.8.2001, the 4th defendant demanded payment of a sum of Rs.6,56,369/0 with interest in default of which the defendants threatened legal action. The plaintiff was informed that the HUDCO had moved the Debt Recovery Tribunal for realising huge amounts.

7. There was a temporary electric connection to the flat and the tax due to the Corporation for the period April 2002 to March 2003, of an amount of Rs.2176/- was also paid by the plaintiff as informed by the 4th defendant. Later on, the plaintiff entered into lease agreement with one M. Ibrahim on 27.6.2002 for leasing out the flat for a rent of Rs.6,000/- per month from 15th September 2002, for a period of 11 months and the tenant occupied the premises on 15.9.2002. At this stage, the 4th defendant disconnected the temporary power supply which was informed to the plaintiff by the tenant. There was a threat of re-possession of the flat by the 4th defendant which prompted the plaintiff to file O.S. No.1531/2002 before the Munsiff's Court seeking a permanent prohibitory injunction against threat of peaceful possession and enjoyment of the property. The interlocutory application filed in the suit for temporary injunction

restraining disturbance of peaceful possession of the flat by the plaintiff and interim mandatory injunction directing reconnection of power supply was granted. Later on, the defendants issued a notice dated 11.6.2003 rescinding the agreement. This has led to the filing of the present suit.

8. Defendants disputed the claim for a decree for specific performance and other reliefs.

9. It may be mentioned herein that in the suit, apart from claiming specific performance, there was an alternative prayer for return of advance money of Rs.11,98,500/- with interest and for realising an amount of Rs.9, 78,720/- with future interest at 18% per annum being the damages suffered by the plaintiff.

10. The evidence consisted of oral evidence of P.W.1 and D.W.1 and documentary evidence Exts.A1 to A25 on the part of the plaintiff and Ext.B1 on the part of the defendants. Exts.C1 and C2 are the commission report and rough sketch attached to it.

11. The court below had initially framed four issues and during the course of the arguments, raised an additional issue whether any of the plaint claim is barred by limitation. It was held that the plaintiff's claim for specific performance as well as damages, is clearly barred by limitation. On the question of return of advance money, it was held that there is a statutory charge under Section 55(6) of the Transfer of Property Act and

hence the period of limitation will be 12 years from 30.11.1997 and accordingly the suit was partly decreed. On the plea of grant of interest, it was found that in Ext.A2 agreement the plaintiff is entitled to return of advance amount with interest at 18%. In paragraph 12 it was held that the plaintiff is entitled to return of the said amount of Rs.11,51,000/- with interest at 18% from 1.12.1997 onwards. But in the decreetal portion, the interest at 18% has been granted from 17.7.1996 till the date of plaint and thereafter at 6% till realisation.

12. The main contentions urged by the parties relate to the dispute regarding liability to pay interest. Learned counsel for the appellant in R.F.A. No.452/2005 Shri E.R. Venkiteswaran submitted that since the plaintiff was put in possession of the flat and car parking area, Section 55(6)(b) of the Transfer of Property Act will not apply and hence there will not be any charge on the property. It was further argued that when possession was given, there will not be any statutory charge. Reliance was placed on the decision of the Supreme Court in **Videocon Properties Ltd. v. Dr. Bhalchandra Laboratories and others** ((2004) 3 SCC 711). It was also argued relying on the decision of the Privy Council in **Thakurain Harnath Kuar v. Thakur Indar Bahadur Singh** (AIR 1922 Privy Council 403) that no interest could have been decreed. It was also submitted that at any rate, the claim for part of interest is barred by limitation.

13. After the appeal was admitted, by order dated 30.8.2005 this

court had directed that the plaint schedule property shall be sold in public auction at the supervision of a Commissioner appointed by this court. This course was agreed upon by both sides and an Advocate Commissioner was appointed to conduct the sale by public auction. Accordingly, the property was sold in public auction which was bid by the appellant in R.F.A. No.452/2005 for a sum of Rs.30,00,000/- and possession has been handed over to him also. The plaintiff was paid Rs.11,98,5000/- through his counsel and the balance amount is put in a Fixed Deposit with Andhra Bank, Ernakulam.

14. The question therefore to be considered is whether the court below was right in granting interest on the advance amount paid by the plaintiff. The court below had relied upon the statutory charge available for a buyer under Section 55(6)(b) of the T.P. Act. The right to have charge on the property and for return of such amount is lost if he has improperly declined to accept delivery of the property. The charge is attracted from the moment the buyer pays any part of the purchase money. In (2004) 3 SCC 711, the question was examined in connection with the issue whether such a charge would extent to earnest money paid also. The dispute was regarding the claim for interest on the said amount paid as earnest money and the controversy involved in the suit was whether the plaintiff is entitled to claim interest on the amount of earnest money. While considering the question, their Lordships examined the legal effect of a statutory charge available for

the buyer under Section 55(6)(b) of the Act. It was held in paragraph 13 as follows:

> "The buyer's charge engrafted in clause (b) of sub-section (6) of Section 55 of the Transfer of Property Act would extend and enure to the purchase money or earnest money paid before the title passes and property has been delivered by the seller to the purchaser, on the seller's interest in the property unless the purchaser has imporperly declined to accept delivery of property or when he properly declines to accept delivery – including for the interest on purchase money and costs awarded to the purchaser of a suit to compel specific performance of the contract or to obtain a decree for its rescission. The principle underlying the above provision is a trite principle of justice, equity and good conscience. The charge would last until the conveyance is executed by the seller and possession is also given to the purchaser and ceases only thereafter. The charge will not be lost by merely accepting delivery of possession alone. This charge is a statutory charge in favour of a buyer and is different from contractual charge to which the buyer may become entitled to under the terms of the contract, and in substance a converse to the charge created in favour of the seller under Section 55(4)(b). Consequently, the buyer is entitled to enforce the said charge against the property and for that purpose trace the property even in the hands of third parties and even when the property is converted into another form by proceeding against the substituted security, since none claiming under the seller including a third-party purchaser can take advantage of any plea based even on want of notice of the charge. The said statutory charge gets attracted and attaches to the property for the benefit of the buyer the moment he pays any part of the purchase money and is only lost in case of the purchaser's own default or his improper refusal to accept delivery."

It is important to notice that their Lordships have held that the **charge would last until the conveyance is executed by the seller and possession is also given to the purchaser and ceases only thereafter**. The charge will not be lost by merely accepting delivery of possession alone. It is lost only in the case of the purchaser's own fault or his improper refusal to

accept delivery. Therefore, merely by accepting delivery of possession alone, the charge will not be lost. The delivery of possession should be coupled with execution of the conveyance by the seller, as otherwise the title will not pass on to the buyer. This is clear from the dictum laid down in the above paragraph. Hence, the contention of the learned counsel for the appellant that since possession was handed over to the plaintiff, he has lost the charge statutorily available under Section 55(6)(b) of the Act, is not correct. The relevant clause concerning liability to pay interest on the part of the defendants is clause 12 of Ext.A2 which was relied upon by the court below also. The same is extracted below:

> "If the terms of the contract are not carried out by the first party on account of the default of the first party without a default on the part of the second party, then the first party shall be liable to pay all the amounts received from the second party together with interest at the rate of 18% per annum from the respective dates of payment."

Thus, the appellants in R.F.A. No.452/2005 have clearly agreed to pay interest on the amount received as advance.

15. Reliance placed on the principle stated by the Privy Council in AIR 1922 Privy Council 403 by the learned counsel for the appellant to advance his contention as regards non-liability to pay interest is not correct. There the question was considered in connection with an agreement which was discovered to be void from inception. The Privy Council, after finding that the agreement was void, ordered interest to be paid only from the date of institution of the suit for the amount allowed to be recovered as compensation. The facts of this case are totally different. This is a case where the agreement was not at all held void by the trial court and there is no case that it was a void agreement. Apart from that, this is a case where the parties have acted upon the agreement and effected construction also as agreed to therein and at no point of time the appellants had a contention that the agreement is void. No circumstances are pointed out to show that the agreement was void from inception. Therefore, the said principle adopted by the Privy Council cannot apply to the facts of this case. In the light of the fact that the plaintiff will be entitled for a charge on the property for the advance money paid, the finding by the court below that the period of limitation is 12 years, is correct.

16. Learned counsel for the respondents Sri.Sandeep Ankarath, relying upon the decision of the Supreme Court in **Delhi Development Authority v. Skipper Construction Co. (P) Ltd. and others** (2000 (10) SCC 130) contended that the period of limitation in such cases is 12 years

and not 3 years. Their Lordships held in paragraph 33, after referring to Section 62 of the Limitation Act, 1963, that "it is clear that the period of limitation for enforcement of the statutory charge created under Section 55 (6)(b) is 12 years from the date when it becomes due and not 3 years. The period remains the same even for enforcement of the charge on the substituted security." It was held therein that interest is payable from the date of payment of the purchase money to the seller till the date of delivery of property to the purchaser or till the execution of the sale deed, whichever is earlier. Therefore, we repel the contention raised by the learned counsel for the appellant that claim for interest is barred by limitation.

17. Herein, we may advert to the contentions raised by the learned counsel for the plaintiff/appellant that the original date fixed for completion of the contract, i.e. 30.8.1997 has lost its relevance in view of the subsequent agreements and settlement arrived at between the parties. Learned counsel for the plaintiff/appellant placed reliance upon the correspondence executed between the parties, viz. Exts.A10, A11, A12, A15 and A16 to contend that in view of the subsequent developments, there is extension of time fixed for performance of the contract and the claim cannot be said to be barred by limitation. In Ext.A9 letter dated 5.3.1996 the 4th defendant even though stated that the construction of the A.B.M. Tower is in full swing, it was

admitted that the project is behind schedule of about two weeks and they are making all their efforts to keep up the completion of the project in time. In Ext.A11 letter dated 6.6.1998 the 4th defendant has conveyed apology for the delay that was caused and has stated that it is due to reasons beyond their control. It is also stated that " after a brief hold-up, the work on the Tower is now in full swing and that the structure has been nearly completed. It is further informed that the 4th defendant expect the work to get over before December. In Ext.A12 letter dated 10.11.1999, the plaintiff has been informed that his apartment has almost been completed and would be ready by March 2000. The remaining jobs to be done on the apartment include flooring, fixing of doors and sanitary wares and the final coat of painting, besides the finishing work of the external and common facilities such as erection of lifts, transformers etc., painting and landscaping which are progressing expeditiously. In fact, in the said letter the 4th defendant has demanded a further payment of Rs.3 lakhs for paying to Housing and Urban development Corporation. In Ext.A15 the plaintiff is informed that the construction of his flat was completed except installation of sanitary fittings such as closets and wash basins where he required the plaintiff's confirmation for the colour. It is requested that he may take possession of his apartment without any further delay. It was agreed that there were negotiations between the parties and mediations were to be made.

Ultimately, by Ext.P16 dated 27.6.2001 the 4th defendant handed over possession of the flat to the plaintiff. These correspondences will therefore evidence that the time fixed for specific performance of the contract has been extended by the parties. In (2006)5 SCC 340, while considering the provisions of Article 54 of the Limitation Act, their Lordships held in paragraph 22 as follows:

> "A bare perusal of Article 54 of the Limitation Act would show that the period of limitation begins to run from the date on which the contract was to be specifically performed. In terms of Article 54 of the Limitation Act, the period prescribed therein shall begin from the date fixed for the performance of the contract. The contract is to be performed by both the parties to the agreement. In this case, the first respondent was to offer the balance amount to the Company, which would be subject to its showing that it had a perfect title over the property. We have noticed hereinbefore that the courts below arrived at a finding of fact that the period of performance of the agreement has been extended. Extension of (sic time for performance of a) contract is not necessarily to be inferred from written document. It could be implied also. The conduct of the parties in this behalf is relevant. Once a finding of fact has been arrived at, that the time for performance of the said contract had been extended by the parties, the time to file a suit shall be deemed to start running only when the plaintiff had notice that performance had been refused. Performance of the said contract was refused by the Company only on 21.8.1985. The suit was filed soon thereafter."

In this case, it is a fact that only by Ext.A24 lawyer notice the plaintiff had notice that the performance had been refused. This is dated 11.6.2003 and the suit is filed on 26.8.2003. It is a clear case where going by the principle stated by the Apex Court the time for performance of the contract had been

extended by the parties and the time to file the suit shall be deemed to have started running only when the plaintiff had notice that performance had been refused. Therefore, the contention by the defendants that the plaint claim is barred by limitation, is not correct in view of the above evidence also. At any rate, Ext.A16 will show that the contract Ext.A2 was varied and the disputes were settled at that time and possession was handed over. It is a case where there was delay on the part of the defendants in completing the construction and therefore the date 30.8.1997 cannot be said to be the crucial date as far as the cut off date for performance of the contract is concerned. In the light of the statutory charge under Section 55 (6)(b) also, the claim for return of advance money with interest is not barred, as held by the trial court.

18. R.F.A. No.378/2006 is filed by the plaintiff aggrieved by that part of the decree by which interest has not been granted from the respective dates of payment of the instalments and also seeking for payment of future interest at 12% from the date of suit.

19. While considering the appeals, the reliefs claimed in the plaint and the court fee paid thereon have also to be considered. Both sides have extensively argued on this aspect. Valuation for the purpose of court fee for the prayer for specific performance is Rs.14,79,000/-. Next one is valuation for the purpose of court fee for prayer No.3, i.e., damages of

Rs.9,78,720/- and the third valuation was for prayer No.4, i.e. decree for injunction. As far as prayer No.2 is concerned, no separate valuation has been made and no further amount has been paid as court fee. The court fee paid is under Sections 22 and 42 of the Kerala Court Fees and Suit Valuation Act of an amount of Rs.2,15,104/-.

20. In R.F.A.No.452/2005, the plaintiff/1st respondents has filed I.A.No.446/2007 under Section 151 C.P.C. for permitting him to remit the deficit court fee of Rs.1,06,400/-. This interlocutory application is field on the premise that the relief of return of advance money of Rs.11,51,000/- with 18% interest if valued, the total amount will come to Rs.28,07,837/- and the court fee payable would have been Rs.2,43,031/- and the court fee remitted is only Rs.1,36,720/-. The application has been filed by pointing out that the appellants in the appeal have a specific contention that court fee has not been paid for the said relief.

21. As regards the relief now claimed in R.F.A. No.378/2006, learned counsel for the defendants pointed out that the plaintiff has not valued the said reliefs as now sought for in the appeal, before the trial court and no court fee has been paid on such amount and therefore the relief sought for in the appeal cannot be granted. Learned counsel for the defendants vehemently contended that what was sought for in the plaint was for return of advance money of Rs.11,98,500/- “with interest” without valuing the said relief and therefore the appeal cannot be entertained and no further

relief can be granted.

22. By relying upon the provisions of Section 12 of the Kerala Court Fees and Suit Valuation Act, 1989, learned counsel for the plaintiff submitted that in such cases the appellate court has got power to consider the correctness of the court fee paid along with the plaint and the court has got ample power to direct the party to pay deficit court fee. It is also contended that a reading of the plaint will show that actually the plea is to the effect that the plaintiff is entitled for return of advance money with interest at 18% from the respective dates of payment and therefore the plaintiff cannot be made to suffer for payment of deficit court fee on the said relief sought for.

23. Hence the next question to be decided is regarding the prayer of the plaintiff for allowing payment of deficit court fee by invoking Section 12(4) of the Kerala Court Fees and Suits Valuation Act. Section 12(4) reads as follows:

> "12(4) (a) Whenever a case comes up before a Court of Appeal, it shall be lawful for the Court, either of its own motion or on the application of any of the parties, to consider the correctness of any order passed by the lower court affecting the fee payable on the plaint or in any other proceeding in the lower court and determine the proper fee payable thereon.
>
> Explanation:- A case shall be deemed to come before a Court of Appeal even if the appeal relates only to a part of the subject matter of the suit.
>
> (b) If the Court of Appeal decides that the fee paid in the lower court is not sufficient, the court shall require the party liable to

pay the deficit fee within such time as may be fixed by it.

© If the deficit fee is not paid within the time fixed and the default is in respect of a relief which has been dismissed by the lower court and which the appellant seeks in appeal, the appeal shall be dismissed, but if the default is in respect of a relief which has been decreed by the lower court the deficit fee shall be recoverable as if it were an arrear of land revenue.

(d) If the fee paid in the lower court is in excess, the court shall direct the refund of the excess to the party who is entitled to it."

Under sub-section (a) the appellate court is given power to consider the correctness of any order passed by the lower court affecting the fee payable on the plaint or in any other proceeding in the lower court and determine the proper fee payable thereon. Going by the explanation, even if the appeal relates only to part of the subject matter of the suit, the case shall be deemed to have been before the court of appeal for the purpose of sub-section (a). Sub-section (b) enables the appellate court to require the party liable to pay the deficit court fee within such time as may be fixed by it.

24. In **Paramu v. Balan** (2001 (3) KLT 803) a learned Single Judge of this court examined the question as regards the power of the appellate court to give direction with respect to the payment of proper court fee in the appellate stage. After referring to Section 12(4) of the Act it was held that the appellate court has ample power to direct payment of deficit court fee as is done by the lower appellate court. Reliance was placed on the decision of the Supreme Court reported in **Sant Lal Jain v. Avtar Singh**

(AIR 1985 SC 857). The case considered by the Supreme Court was one for mandatory injunction against a licensee. Their Lordships held as follows:

> "The suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds is possession of the property to which he may be found to be entitled. Therefore, the appellant should not be denied relief merely because he had couched the plaint in the form of a suit for mandatory injunction."

The learned Single Judge found no illegality in the said method adopted by the court in that case. Reliance was also placed on the decision of a Division Bench of this court in **P.P.S. Pillai v. Catholic Syrian Bank** (2000 (3) KLT 629) also. After considering the power of the appellate court it was held that "Section 12(4) of the Court Fees Act confers jurisdiction on the appellate court to consider either of its own motion or on the application of any of the parties the correctness of the order passed by the trial court affecting the fee payable on the plaint. If the court of appeal decides that the fee payable in the lower court was not sufficient, the appellate court shall require the parties liable to pay the deficit court fee, within a the time as may be fixed by it. The further provision is that if the deficit fee is not paid within the time fixed and the default is in respect of a relief which has been dismissed by the lower court, the appeal shall be dismissed." In the light of the above principle also, the

learned counsel for the appellant is well founded in his submission that this court has power to allow the plaintiff to pay deficit court fee. We find that the plaintiff has made a specific prayer as prayer No.2 in the plaint for return of the advance money of Rs.11,98,500/- with interest. In the plaint in paragraph 3 it was clearly averred that the plaintiff is entitled to realise the amounts paid, from the 4th defendant with interest at 18% per annum from the respective payment dates. The respective payment dates have been explained in paragraph 4 of the plaint. Therefore, it is a case where adjudication was called for as regards the liability to pay interest at 18% on the advance money of Rs.11,98,500/-. Further, in the written statement in paragraph 13, the liability to pay interest on the advance amount has been disputed by the defendants also.

25. Apart from that, a reference to relief No.3 is also necessary to consider the contentions. There, a sum of Rs.9,78,720/- with future interest at 18% has been sought being the damages suffered by the plaintiff. The details in respect of the claim is available in paragraph 12 of the plaint. It has been clearly stated that "the plaintiff had paid an amount of Rs.11,51,000/- as on 18.9.1996 and the cost of the flooring to the defendant. Had the possession been handed over in time, the plaintiff could have utilized the building profitably. Hence, the plaintiff is entitled to get Rs.8,28,720/- being the interest on the amount paid upto 30.8.1997 at the

rate of 18%." Therefore, the foundation for claim of interest at 18% on the amount paid upto 30.8.1997 has been laid in the suit. It is true that the same along with the rent receivable by the plaintiff is quantified as prayer NO.3 representing the damages suffered by the plaintiff. Proper court fee has also been paid on the basis of the said valuation. Therefore also it cannot be held that the defendants have been surprised by the claims made in the appeal by the plaintiff and about his entitlement for payment of interest at 18% as per the terms of Ext.A2 on the advance money.

26. In R.F.A. NO.378/2006, the refusal of the court below to grant specific performance and the claim for damages is not challenged. As we have already held, in Ext.A2 the clear stipulation under clause 12 casts a liability to pay interest at 18% from the respective dates of payment. Learned counsel for the respondents in R.F.A. No.378/2006 pointed out that even though in paragraph 12 of the judgment the trial court found that the plaintiff is entitled to return of the amount of Rs.11,51,000/- with interest at 18% from 1.10.1997 onwards, in the decreetal portion it is granted from 17.7.1996. The said date has no importance or relevance.

27. In view of the contentions raised by the parties, we feel that the issue regarding the liability to pay interest under various heads including claim for future interest at 18% has to be decided afresh by the trial court. We adopt the said course in the light of the fact that the prayer of the plaintiff to remit additional court fee on relief No.2 of the plaint is just and

reasonable. The issue regarding deficiency in payment of court fee is a matter which going by the provisions of Sections 12 and 16 of the Court Fees Act, can be decided by the appellate court. Therefore, we allow the plaintiff to remit the amount of court fee as sought for in I.A. No.446/2007. This shall be paid within one month from today. If the amount is not remitted, the plaintiff will not be entitled for the said claim. In R.F.A. No.378/2006, the appellant has sought for various reliefs which, going by the valuation shown in the plaint, have not been shown therein. This requires a proper amendment of the valuation of the plaint with opportunity for the defendants to contest the claim on merits also. Therefore, to enable the plaintiff to amend the valuation in the plaint and to pay the deficit court fee with liberty to the defendants to take up all available contentions on merits, we remand the matter for fresh disposal on all the above aspects. The remand is confined only to the above aspects and the decree as regards the refusal to grant specific performance and damages as well as return of advance amount, stands confirmed as no challenge is made by the plaintiff about them in his appeal. The court below will dispose of the suit within five months from the date of receipt of records from this court. The interim order passed by this court in R.F.A. No.452/2005 on

10.8.2006 will continue to be in force and its fate would depend on the decree passed by the trial court. No costs.

The appellants in both the appeals will be entitled for refund of the court fee paid on the memorandum of appeals.

(Kurian Joseph, Judge.)

(T.R. Ramachandran Nair, Judge.)

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